Supreme Court, U. S.
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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1976

No. 76-102

FRED E. RINGE, JR.,

Petitioner,

v.

THE UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

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July 23, 1976

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No.

FRED E. RINGE, JR.,

Petitioner,

v.

THE UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

Petitioner Fred E. Ringe, Jr. respectfully prays that a writ of certiorari issue to review the Order of the United States Court of Claims which sustained a decision of the United States Civil Service Commission Board of Appeals and Review upholding the Decision and Recommendation of the United States Civil Service Commission Appeals Examiner that Petitioner's dismissal by the Goddard Space Flight Center of the National Aeronautics and Space Agency be sustained.

OPINION BELOW

The Order of the United States Court of Claims was rendered on April 23, 1976. A copy of the Order is set forth entirely as Appendix A to this Petition.

JURISDICTION

The jurisdiction of this Court is invoked pursuant to 28 U.S.C. Section 1255(1).

QUESTIONS PRESENTED

In a case involving dismissal of a federally employed government contract specialist, should the U.S. Court of Claims have considered:

1. Petitioner's defense against his dismissal, that is, evidence that management of the agency which dismissed Petitioner disregarded procurement laws and regulations it was bound to observe?

2. That the Appeals Examiner limited testimony only to evidence directly related to the agency charges against the Petitioner, thereby depriving him of his right to testify fully on his defense against dismissal?

3. The foregoing questions Nos. 1 and 2, even though the questions have not been presented on an earlier appeal before the U.S. Civil Service Commission Board of Appeals and Review?

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

United States Constitution, Amendment V:

"No person shall * * * be deprived of life, liberty, or property without due process of law.

Title 5 United States Code, Section 5701(a). An individual in the competitive service may be removed or suspended without pay only for such cause as will promote the efficiency of the service.

STATEMENT OF THE CASE

Fred E. Ringe, Jr., Petitioner herein, on July 23, 1971, was dismissed from his position as a government contract specialist Contracting Officer, GS-13, by the Goddard Space Flight Center (GSFC), a subsidiary agency of the National Aeronautics and Space Administration (NASA). Upon hearing and summation of the evidence presented, the Civil Service Commission (CSC) Appeals Examiner found for GSFC and upheld the dismissal. Petitioner appealed to the CSC Board of Appeals and Review (BAR), who also sustained the Examiner's decision. Finally, Petitioner requested review by the United States Court of Claims, and thereupon to grant Petitioner a motion for summary judgment, reinstating him to his position.

Petitioner was opposed by the United States Department of Justice for the Government in behalf of GSFC, who entered a cross-motion for summary judgment and dismissal.

GSFC based its removal of Petitioner upon six charges of misconduct, as follows:

1. Inadequate performance.
2. Refusal to follow directions.
3. Threat to his supervisor.
4. Insubordination.
5. Wilfull disrespect.
6. Failure to perform duties.

GSFC supported the charges by a seventeen-page Notice, setting forth the allegations, all of which occurred in the environment of GSFC contract procurement related to the NASA Apollo Program. The Notice contained not even a hint of wrong-doing on the part of GSFC procurement management.

The dismissal charges were an outgrowth of an accumulative series of five administrative proceedings conducted by and between GSFC management and Petitioner during 1969 and 1970. Each one of the five proceedings was reviewed by the CSC Appeals Examining Office and BAR. CSC rejected the first proceeding on jurisdictional grounds, and the third and fourth due to untimely filing. The CSC upheld the agency in the second and fifth action to the extent that, upon review of the documents, it found that due process requirements had been met by the agency. None of the administrative proceedings were of sufficient moment to warrant a hearing at the CSC level. Significantly, Petitioner in stating his claims to the Court of Claims drew upon evidence in the proceedings pertinent to his defense against dismissal, even though the CSC Appeals Examiner had refused to permit testimony on such evidence at the hearing on dismissal.

Petitioner's statement on the record, when combined with applicable laws and regulations, clearly shows there was more than probable cause that Petitioner had a defense to his dismissal. That defense was based mainly upon Petitioner's charges set forth in Part III of his brief before the Court of Claims that GSFC Procurement management disregarded procurement laws and regulations. Petitioner in Part I of his brief protested aspects of the administrative hearing which were prejudicial to his rights. The most critical aspect is again herein reiterated;

that is: elements of additional evidence material to Petitioner's defense were excluded by the CSC Appeals Examiner from testimony during the Petitioner's hearing relative to his dismissal.

The Court of Claims neither considered nor rejected the validity of Petitioner's claims. Instead the Court declined to consider them, holding that it was powerless to do so because the claims had not been pleaded specifically during Petitioner's appeal before the BAR. On basis of the limited evidence on the CSC record, the Court of Claims, finding the Government had sustained the GSFC action, granted the Government's cross-motion, and dismissed Petitioner's motion for summary judgment.

REASONS FOR GRANTING CERTIORARI

I.

IF GSFC DISREGARDED PROCUREMENT LAWS AND REGULATIONS, THEN IT ERRED IN DISMISSING PETITIONER BECAUSE HE REFUSED TO DISREGARD THEM.

Petitioner alleged before the Court of Claims that testimony at the CSC administrative hearing supported Petitioner's defense against dismissal; that is, GSFC procurement management disregarded procurement statutes and regulations in order to meet self-imposed contract schedules. Petitioner's analysis of incidents in which CSFC procurement management disregarded procurement laws and regulations have been set fourth in Appendix B to this Petition, and consists of exceprts from Part III of Petitioner's Main Brief before the Court of Claims. Charge No. 1, inadequate performance, and Charge No. 6, failure to perform duties are not supported when evidence on the record, together with evidence

improperly excluded from testimony, are reviewed in context with applicable procurement and civil service statutes and regulations. Charge No. 2, refusal to follow directions, while it was indicative of GSFC confusion over the legalities in authorizing private contractor use of a government-owned facility, is not addressed herein because the Court of Claims in that instance found for the Petitioner.

Petitioner further contended that GSFC procurement management over several years pressured Petitioner to also disregard the legal provisions, which he refused to do. In fact, GSFC's charges Nos. 3, 4, and 5 of misconduct, respectively a threat, insurbordination and wilfull disrespect on the part of the Petitioner, were relatively minor and inconsequential when cast in the surrounding circumstances of disregard for procurement law and regulations vice pressure to meet procurement plan schedules. Actually they were the result of the mounting pressure by GSFC procurement management upon Petitioner from before 1968 until 1971, when his dismissal took effect. The analysis of those "surrounding circumstances", and their impact upon the Petitioner's alleged misconduct, are expressed in Appendix C to this Petition, and consist of Part IV of Petitioner's Main Brief before the Court of Claims.

There were enough of Petitioner's statements in testimony corroborated by GSFC's counsel's admissions, GSFC witness statements, and in the GSFC procurement documentation to indicate that GSFC procurement management disregarded procurement laws and regulations. On the strength of such evidence petitioner charged before the Court of Claims that GSFC procurement management, while dismissing Petitioner, failed to consider its own illegal conduct, and therefor ran afoul of the

doctrine underlying *United States ex rel O'Shaughnessy v. Accardi,* 347 U.S. 260, and restated by the Supreme Court in *Service v. Dulles,* 354 U.S. 363: " . . . regulations prescribed by a government administrator are binding upon him".

The Court of Claims has made findings of fact which mis-characterize Petitioner, such as, he "bitterly resented promotion to supervisor of another contract specialist", that he gave the new supervisor a "hard time", and that he created " 'either he goes, or I go' " situation. What in the original context was an alleged threat to "slap" his supervisor, by the time it passed through the Court of Claims, had enlarged to a major assault of "physical violence" by the Petitioner.

The Court of Claims observations epitomize the misunderstanding that existed from the beginning of Petitioner's dispute with GSFC procurement management. From the beginning Petitioner has endeavored without success to establish one point only, that is: Petitioner would not disregard procurement laws and regulations in order to meet GSFC procurement schedules. His difference with his supervisors was no more than an outgrowth of the dispute. Law and regulations to the contrary notwithstanding, GSFC procurement management pressured a new supervisor to compel Petitioner to meet its schedules. That circumstance along forced the two men into a controversial relationship.

Petitioner's argument, supported by the evidence on the record, that the GSFC procurement management disregarded procurement laws and regulations is in itself of sufficient importance to warrant review by the Supreme Court. The United States annually expends immense sums of tax dollars in privately contracting for its needs. Congress through statutes, and agencies through

regulations promulgated to fulfill Congressional intent, underwite in the United States the system of free enterprise and the integrity of the competitive system. Similarly the efficacy of the United States Civil Service is preserved by placing restrictions on how the government may contract to fill non-civil service man-power requirements. (Appendix B, Part A and B).

Evidence of GSFC procurement management's disregard of its duty to fulfill those statutory commitments is serious enough. But when GSFC fired and employee holding and for years exercising all the discretions vested in the warrant of a contracting officer, because he refused to participate in such malfeasance, then the agency conduct become flagrant.

The *U.S. ex rel O'Shaughnessy v. Accardi, supra* rule has been reiterated in a multitude of related cases by the Supreme Court, and each of the United States Courts of Appeals. The Court of Claims has stated: ". . . . settled . . . if the department does not comply with its own regulations the discharge is invalid. Cf. *Service v. Dulles* 354 U.S. 363."*Morelli v. United States,* 177 Ct. Cl. 848, and *John Joseph Whalen v. United States,* No. 14-74, decided January 28, 1976. The application of the principle that a government agent (i.e., a contracting officer) does not have authority to do what is prohibited by statute is well expressed in *Federal Crop Insurance Corp. v. Merrill et al.,* 332 U.S. 380 (1947). See also, Appendix B, pp. 14b-15b, "Conclusion."

II.

IF THE APPEALS EXAMINER IMPROPERLY RESTRICTED TESTIMONY TO PROVING GSFC CHARGES, THEN PETITIONER WAS DEPRIVED OF DUE PROCESS OF LAW, BECAUSE THEREBY PETITIONER WAS DENIED THE RIGHT TO A FULL EVIDENTIARY HEARING IN ORDER TO TESTIFY ON ALL MATTERS MATERIAL TO HIS DEFENSE TO DISMISSAL.

Petitioner alleged before the Court of Claims that he was denied due process of law by the Appeals Examiner. The Examiner limited testimony to only that evidence which supported GSFC's charges, thereby preventing Petitioner from presenting any evidence to buttress his allegations of GSFC's illegal procurement practices.

The Court of Claims took note that the "issue" urged by Petitioner consisted of ". . . efforts of management to force plaintiff to award contracts in violation of rules made mandatory . . . by various statutes and regulations". It further observed that "The careful and thorough report of the Appeals Examining Officer contains nothing to show its writer was even aware of the existence of any such issue".

The Appeals examiner appeared to proceed upon the premise that Petitioner's defense must be a simple denial of GSFC's charges. On page 20 of the transcript of testimony at the hearing on dismissal, the Appeals Examiner stated:

> ". . . The Commission's only jurisdiction at this hearing is on the specific charges which you have proposed against this gentleman. You have given certain specific situations in which you allege that his performance was unsatisfactory. The Commission will hear testimony with respect to that.

> You've also cited other specific reasons or proposing his removal which you allege certain other types of conduct which, if I remember correctly, all occurred in 1970. The Commission will expect you to confine your examination of witnesses to the issues which the Commission has before it."

Petitioner's defense was a confession and avoidance, the aforesaid "issue" being the avoidance. So Petitioner in testimony denied only in part that he committed the specific acts charged. He narrated instances in which GSFC procurement management disregarded procurement laws and regulations. But the Examiner brushed aside all of Petitioner's testimony as being without merit. Otherwise, by the Examiner's rule which limited testimony to proving GSFC charges, Petitioner was precluded from testifying to the "issue".

Thus it is evident that the reason why the Appeals Examiner was not aware of the "issue" is because he excluded testimony on anything but proof of the GSFC charges; and because he refused to give credence to the Petitioner's testimony which addressed the "issue".

In *Arnett v. Kennedy,* 416 U.S. 134, 94 S.Ct. 1633, (decided April, 1974) the Supreme Court make it clear that a person being dismissed from the federal service, the one losing property such as his position, career and attendant benefits, was the person who has the right to a ". . . *full* evidentiary hearing . . ." (emphasis added).

Justice White, concurring, observed: "Here the Constitution and the Lloyd-La Follette Act converge, because a full trial-type hearing is provided by statute before termination from service becomes final by way of appeal . . . through the Civil Service Commission . . .". 94 S.Ct., pg 1660.

In limiting testimony to GSFC charges, the Appeals Examiner restricted Petitioner from fully defending against dismissal. That the examiner was not aware of the "issue" did not make it go away. Petitioner urges that his right to a proper defense is still alive, that he will endure severe injustice if the cause is not reviewed and reversed.

III.

IF THE RIGHT UNDER DUE PROCESS OF LAW TO A FULL EVIDENTIARY HEARING IS ACCORDED BY STATUTE, THEN THE U.S. COURT OF CLAIMS SHOULD HAVE REVIEWED WHETHER PETITIONER'S RIGHT WAS LIMITED IN THE ADMINISTRATIVE HEARING, EVEN THOUGH THE MATTER WAS NOT PROPERLY APPEALED BEFORE THE ADMINISTRATIVE REVIEW BOARD.

The Court of Claims refused to consider the first and second questions heretofor set forth because they had not been specified by Petitioner on his appeal to the CSC BAR. In oral argument Petitioner pressed the Court of Claims to consider the Supreme Court principle ennunciated under *Hormel v. Helvering,* 312 U.S. 552, 558:

> "These deicsions and others like them, while recognizing the desireability and existence of a general practice under which appellate courts confine themselves to the issues raised below, nevertheless do not lose sight of the fact that such appellate practice should not be applied where the obvious result would be a plain miscarriage of justice".

The Court of Claims applied the *coup d'etat* to that argument: "the matter is not one for application of the 'plain error' doctrine either by BAR or by us."

Petitioner retained outside counsel to conduct his defense against dismissal. In his appeal before BAR Peti-

tioner's counsel failed to delineate that the Appeals Examiner, by limiting testimony to evidence on GSFC's specific charges, had imposed restrictions upon Petitioner's right to testify at the hearing on all points related to his defense against dismissal; or point out the GSFC procurement management's own complicity as a cause of the alleged misprecedence over procurement laws and regulations, and by pressuring Petitioner against his will and better judgment to do the same.

In the eyes of the Court of Claims Petitioner's counsel's failure to specifically identify in his appeal to BAR the Appeals Examiner's restrictions upon Petitioner's evidence was decisive, and of course, was anticlimactic. Thereby the Court vindicated GSFC from its alleged illegal conduct without ever having examined one shred of evidence against the agency. It left Petitioner's dismissal where it found it, even though he was accorded less than his full right, under due process of law, to present a full defense against that dismissal.

The Court looked no further than its own case law to support its conclusion that "The constrictions of the adversary system of justice . . ." precluded it from consideration of Petitioner's "asserted errors". *Michienzi v. United States,* 207 Ct. Cl. 484 (1975); *Haynes v. United States,* 190 Ct. Cl. 9 (1969).

This ultimate limitation which the Court of Claims imposed upon itself does not fully comport with the Supreme Court attitude where a statutorily prescribed right is involved, the deprivation of which raised the imminence of injustice. In *Hormel v. Helvering, supra,* pg 558, the Supreme Court continued:

> "Whether articulated or not the philosophy underlying the exceptions to the general practice is in accord with the statutory authority given to courts reviewing decisions of the Board of Tax Appeals — decisions not in accordance with law should be modified, reversed and remanded 'as justice may require' ".

One form of "exception to the general practice" indicated by the court was "those . . . which have been remanded because the lower courts failed to give consideration to a phase of the case involving legal theories not presented", *Hormel v. Helvering, supra,* pg. 558, and see Footnote No. 6 thereunder, e.g. *United States v. Shelby Iron Works,* 273 U.S. 571, 579.

Inasmuch as "the philosophy underlying the exceptions to the general practice" relates to "these decisions and others like them", the question is raised: does *Hormel v. Helvering, supra,* state a general rule which is applicable to any court authorized to review a statutory right similarly accorded by Congress under particular federal laws? In *Arnett v. Kennedy, supra,* The Court held that under the Lloyd-LaFollete Act (5 U.S.C. 7501) removal for "cause" such as will "improve the efficiency of the service", must be accorded a ". . . full evidentiary hearing . . .". The Court observed that the substantive right may not be viewed wholly separately from the procedure provided for its enforcement. As noted heretofor, Petitoner has argued that he did not receive a *full* evidentiary hearing.

If the Supreme Court in *Hormel v. Helvering* stated a general principle of law, then Petitioner requests that a determination be made whether or not the limitations placed on the Petitioner's opportunity to present his full defense at the CSC hearing was, under *Arnett v. Kennedy, supra,* a denial of Petitioner's rights established under the Lloyd-LaFollete Act; and whether, in view of evidence that GSFC, in disregarding procurement laws

and regulations, under the *U.S. ex rel O'Shaughnessy v. Accardi* line of decisions, acted prejudicially and unjustly towards Petitioner, and therefor erred in dismissing Petitioner.

CONCLUSION

For these reasons a writ of certiorari should issue to review the judgment of the United States Court of Claims.

Respectfully submitted,

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July 23, 1976

APPENDIX A

IN THE UNITED STATES COURTS OF CLAIMS
No. 203-74

FRED E. RINGE, JR.,
Plaintiff,

v.

THE UNITED STATES,
Defendant.

Before NICHOLS, *Judge*, Presiding, DURFEE, *Senior Judge*, and BENNETT, *Judge*.

ORDER

This back pay and reinstatement claim is before the court on cross motions for summary judgment. The plaintiff, an employee of the National Aeronautics and Space Administration, a Contract Specialist, GS-13, was removed from his position on the grounds of inadequate performance, refusal to follow directions, threats to his supervisor, insubordination, wilful disrespect, and failure to perform duties. Plaintiff took unsuccessfully the customary appeal to the Civil Service Commission (CSC), and with an adverse decision by the Board of Appeals and Review (BAR), he had exhausted his administrative remedies. He sued here within a reasonable time thereafter.

The issue plaintiff urges principally before us is that his controversies with management and omission to take

required steps on time rose out of efforts of management to force plaintiff to award contracts in violation of rules made mandatory with respect thereto by various statutes and regulations. He does not appear to have used the grievance procedures of the agency directly to challenge his receipt of allegedly illegal orders. Whether he could use the review of an adverse personnel action for a kind of collateral attack on agency procurement policies is a novel and interesting question which is not properly before us because is was not properly presented to the BAR. The careful and thorough "report of the Appeals Examining Officer contains nothing to show its writer was even aware of the existence of any such issue," and plaintiff's subsequent appeal to the BAR makes no complaint of the omission below to consider it and make findings with respect thereto. The matter is not one for application of the "plain error" doctrine either by the BAR or by us. Counsel before us explains that the different counsel who appeared before the Commission was inexpert in Government procurement matters. Plaintiff himself, however, was a lawyer and a procurement expert. The constrictions of the adversary system of justice do not permit us to correct counsel's asserted errors in this manner. Agency action cannot be labeled arbitrary and capricious because it failed to consider an issue the parties did not urge. *Michienzi v. United States*, 207 Ct. Cl. 484 (1975); *Haynes v. United States*, 190 Ct. Cl. 9, 418 F.2d 1380 (1969).

Plaintiff appears to have bitterly resented the promotion of another Contract Specialist of previous lower rank tham himself, to fill a supervisory position over him, newly created a reorganization. He would relitigate the propriety of this selection here, but has no standing to do so in this case, having dropped the grievance appeal that

directly asserted this selection as a grievance. He admits giving the new supervisor a hard time. The personality clashes that resulted intermingled with disputes about procurement procedure, in which plaintiff's positions may well have been taken in perfect good faith, though we decline to determine if they were right. Still, a subordinate who, going beyond respectful expression of difference of opinion, creates an "either he goes or I go" situation, is in all human experience, often the one who has to go.

We think that we should not approve the Reason for Removal, No. 2, which asserts that plaintiff refused to obey an order unless it was in writing. When it was written down, he did promptly obey it. We think, in the context of a dispute over procurement procedures such as we have here, a subordinate holding a position such as the plaintiff's has a right to demand that an order he deems improper should be put in writing. Certainly there must be some channels open to him, by which to express respectful disapproval, and that one is time honored. Our reservation does not affect the result since his other indications of disapproval of his supervisor, specified in the removal notice, had no justification or palliation and fully support the removal, such as his threats of physical violence, and his verbal abuse.

Plaintiff's other points have been carefully examined and found lacking in weight here, either because not urged below, or because effectively refuted by defendant. Upon consideration of the record, briefs, and oral argument, we determine that the decision of the BAR here under review was not arbitrary and capricious, not contrary to law, and not lacking is support by substantial evidence. The plaintiff's motion for summary judgment is

denied. The defendant's motion for summary judgment is allowed. The petition is dismissed.

April 23, 1976

BY THE COURT,

Philip Nichols, Jr.,
Judge, Presiding.

APPENDIX B

[Excerpts from Part III of Petitioner's Brief before the Court of Claims]

ARGUMENT

III.

THE DELAYS CHARGED TO PLAINTIFF'S UNSATISFACTORY PERFORMANCE WERE CAUSED BY GSFC PERSONNEL FAAILURES TO FULFILL IN A TIMELY MANNER LEGAL REQUIREMENTS WHICH PLAINTIFF INSISTED CORRECTLY HAD PRIORITY OVER GSFC SCHEDULES.

* * *The GSFC administrators throughout attacked plaintiff's apparent failure to plan or make progress on procurements in accordance with the Milestone Reporting Manual.[28] * * *

But failure to meet schedules was not the whole case. Plaintiff's job description requires of a contract specialist ". . . initiative and participation in depth with technical personnel in setting up a procurement pattern or plan . . . but *at the same time conforming to over-all procurement laws, regulations and sound business practice*" (emphasis added).[31] Conversely, GSFC being a creature of NASA, the purchase of property and services by GSFC also are bound by policies and procedures

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[28]Record–Part I, Agency Exhibit No. 1, pp. 343-375: Milestone Reporting Manual.

* * *

[31]Record–Part II, Page 21 (quoting "Major Duties", subparagraph (1).

expressed in the NASA Procurement Regulation (NPR).[32]

In testimony plaintiff observed that NPR regulations applied not only to negotiators. He stated that NASA Procurement Regulations applied to ". . . all others in the Procurement Operation (including Technical, Quality Control, Audit, Pricing, Legal and other experts) and particularly the Contracting officer." Plaintiff explained how the inputs by each of the specialists constituted the coordinated efforts of a team (Tr. 174, 176), and referred to examples stated in the CSC "Position Classification Standards" upon which his job was based.[36] * * *

Plaintiff's inference is that "efficiency of the Federal service" may not be measured in the vacuum of Milestone schedules. In the order of precedence procurement laws and regulations come first; then GSFC procedures (i.e. Milestone Reporting Manual) by which the "team" coordinates a procurement request into a plan to a proposal, to a negotiation and finally into a contract.[38] In other words, plaintiff's delays were not due to any dilatoriness on his part, as alleged by GSFC. The delays were necessitated in order to bring the procurement in line with prevailing legal requirements.

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[32]National Aeronautics and Space Act of 1958, as amended (Public Law 85-568; 42 U.S.C. 2451, et seq.) and Chapter 137, Title 10 of the United States Code, Authorizing issuance of NASA Procurement Regulations, published at 41 C.F.R., Chapter 18.

* * *

[36]CSC Doc.TS 78, "Position Classification Standards", Contract Negotiator GS-1102.13, Part I, February 1969, pages 22 and 23. Also NPR 3.801-2(b) The Contracting Officer coordinates a team of experts.

* * *

[38]NPR 1.402(a) (i)-(iii) and (b).

A. GSFC Personnel Failed To Obtain Proper Approvals For Contracting Out Nonpersonal Services Before Submitting Requirements To The Procurement Division.

GSFC charges consistently alleged delays were caused by dilatory conduct on the part of plaintiff. One of plaintiff's responses to those charges was his insistence that before a Procurement Request (PR) was valid, the PR must first comply with NPC 401 (Tr. 206-207). The regulation stated both the NASA policy in regard to contracting out for services instead of using government employees, and the procedure for determining whether support and nonpersonal engineering service contracts were in accord with federal Civil Service Laws.

. . . It was CSC Federal Personnel Manual (FPM) Letter No. 300-8 supplemented by CSC FPM Letter No. 300-12, respectively issued December 12, 1967 and August 20, 1968, promulgating what is popularly referred to as the "Pellerzi" opinion,[39] which generated NASA GSFC's prominence when the CSC General Counsel found that certain NASA GSFC on-site technical support services contracts violated federal personnel laws. The opinion was concurred in by the Comptroller General on November 1, 1967 (B-133394). The Pellerzi decision has figured heavily in a six-year litigation commenced by a

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[39]Civil Service Commission General Counsel, L.M. Pellerzi, issued his opinion October 18, 1967. He found GSFC contracts were unauthorized when judged against criteria imposed by federal personnel laws, that they did not conform to policy prescribed in Bureau of Budget Circular No. A-76, that the U.S. Civil Service could supply the personnel needed at GSFC, and set down criteria to be used in reaching determinations that the contracts were lawful. In Appendix A of the opinion, supported by 45 footnotes, federal laws, executive orders and regulations were indicated which are subject to violations through illegal contracting out practices.

* * *

government employees' union against NASA in December 1967 whereunder a federal district court found a NASA installation in violation of both the NASA Enabling Act, 42 U.S.C. 2473(b)(2) (1964), and the Civil Service Laws, 5 U.S.C. 2101, et seq., *Lodge 1858, American Federation of Government Employees, et al, v. Administrator, NASA, et al.*, Civil A. No. 3261-67 (Nov. 30, 1973) decided by the United States District Court for the District of Columbia.

The Pellerzi decision was intended to halt as illegal the contracting out by federal agencies of certain services and support, the while dismissing federal civil service status employees who performed the same work. Thus, in applying NPC 401, the Pellerzi opinion posed the question squarely to both NASA and GSFC management in each procurement whether GSFC was complying with the legal personnel standards expressed in Title 5 U.S.C., Section 2105(a).

* * *

Approval of nonpersonal services on engineering services type of contracts was first raised in testimony on procurements 810-94203 and PR 810-94202.[42] The procurements were assigned to plaintiff on April 22, 1969 (Tr. 83), and reassigned June 18, 1969 (Tr. 84) for two reasons, one of which was ". . . because the only progress made by Mr. Ringe was the forwarding of the justification for nonpersonal services to the Manpower Utilization division for . . . approval." (Tr. 86). Similarly, PRs 830-96209 and 830-96213 met the same fate.[43] Both

[42]Record–Part I, Agency Exhibits Nos. 4 and 5, pages 378 and 379, respectively.

[43]Record–Part I, Agency Exhibits Nos. 6 and 9, pages 380 and 383, respectively.

* * *

were assigned September 11, 1969, and reassigned, the latter on December 23, 1969 (Tr. 101).

Relying upon regulation NPC 401, plaintiff's point was that approval of procurement of nonpersonal engineering services is a prerequisite to valid procurement requests for engineering services (Tr. 206-208). "The forwarding . . . for approval . . . for nonpersonal services is the duty of the initiator." (Tr. 210). Until that approval has been obtained the PR is not a valid requirement, and therefore the time of Milestone schedules may not start to run. Mr. Tominovich's position was that one of the negotiator's duties was to obtain approval of nonpersonal services while processing the planning documents during the time assigned under Milestone No. One. (Tr. 83-94)

How was the matter settled?

Plaintiff stated: " . . . only after Mr. Goldman consulted with counsel . . . my views were upheld . . ." (Tr. 212, 229) Although that statement stands uncontroverted, the hearing officer considered it not ". . . to have merit."

Yet that interpretation of the NPC 401 procedure by the Agency counsel established the legal priority of NPC 401 over Milestone schedules, and affirmed plaintiff's contention.

B. Delay Resulted From GSFC Management Decisions On Policy In Order To Draft Level Of Effort (LOE) Type Contracts In A Manner Which Would Assure That GSFC Met Statutory Criteria For Contracting Out Nonpersonal Services.

* * *

. . . compliance with Title 5 U.S.C. 2101, et seq. civil service statutes in accordance with CSC FPM 300.8 and FPM 300.12, *supra*, accomplished through the NPC 401 procedures had opened a Pandora's Box of contractual

problems. The "Pellerzi" opinion noted that GSFC contracts which violated federal personnel laws were LOE cost-plus-award-fee contracts. Through the contract provisions government control was exercised over contractor personnel. Statements of work were too general, allowing government personnel too wide a latitude to control the ordering of contractor personnel and their work. The work was performed on government-owned sites, using government-owned equipment. Under certain conditions noted in the CSC FPM letters the presence of such provisions in the contracts rendered them illegal.

Throughout the agency procedures . . . were being applied in formulating technical, financial, contractural and legal aspects of contracts . . . Both form and substance of such contracts were under study and revision to meet the stringent standards imposed by the statutory interpretations of CSC. Exacerbating all of that was the continuing demand that the NASA Apollo Project schedules be met.

In view of the priority of procurement regulations over schedules heretofore noted, plaintiff's contentions concerning form and legality of LOE contracts were not improper. But what were plaintiff's contentions; or for that matter, what were those of GSFC management? Neither in the repetitious self-serving GSFC charges against plaintiff in CSC appeal cases . . . , nor in the file on Case No. Six on dismissal, nor in the array of exhibits put in evidence by GSFC, nor in the testimony were the precise differences addressed regarding the plaintiff–GSFC management arguments over LOE contracts.

* * *

. . . GSFC counsel offered in evidence a memorandum* * *

The memorandum is the one cogent statement on the LOE form of contract dispute that bridged the entire gamut of this litigation. It reveals–

1. A disagreement existed of long-standing duration.
2. It was not limited to plaintiff and Mr. Goldman.
3. It involved the major components of GSFC, possibly NASA.
4. It was of sufficient scope to warrant a team study.
5. The study continued through 1969 into 1970, the period when plaintiff and GSFC management differed on appropriate form and content for LOE contracting-out of nonpersonal services.
6. The range of subjects studied, and the composition, qualifications, caliber, experience, and level of authority of the team is not known.
7. It was ". . . agreed that inclusion of ranges provide a flexibility and the use of task assignments permits the Contracting Officer . . . to screen . . . actions prior to their issuance."
8. Standard schedule clauses for greater uniformity and simplicity were "recommended."
9. It had the approval of "Legal" (Office of Counsel) and "PRB". Mr. Goldman stated he had plaintiff's memorandum to the points and understood plaintiff's concern. It is then at last noted that plaintiff's stand had been in favor of a "mission" type contract.[48]

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[48] "Mission" type LOE contracts are not defined as such in the NASA Procurement Regulations or in testimony. The term is intended to describe a more conservative LOE statement of work which limits the range of discretion in which a contractor may perform, but at the same time provides for less control by government personnel.

* * *

Throughout the testimony . . . shows that numerous meetings occurred in the period prior to Mr. Goldman's memorandum, involving plaintiff and GSFC legal, technical and contract management (i.e. Tr. 116). Hence the memorandum itself leads to the conclusion that plaintiff's "mission" approach to LOE contracts was being hotly debated pro and con by someone.* * *

The LOE controversy was in progress during the period when NASA, including GSFC, was under the edict of FPM Letters 300.8 and 300.12 to comply with Title 5 U.S.C., Section 2101 et seq. The compliance would ultimately emanate into reality through modifications to the form of contracts only after prolonged discourse and agreement on the substance of such changes. So long as such a process prevailed during plaintiff's processing of the procurements there can be no validity to any finding by GSFC or CSC that the cause of plaintiff's delays were due to his alleged dilatoriness. There must first be a showing that the cause was not due to the LOE controversy. The evidence is very much to the opposite effect.

C. * * *Evidence Introduced By Plaintiff Indicates The Cause Of Delay Was Due To Failure Of GSFC Personnel to Comply With NASA Procurement Regulations (NPR).

* * *

In *Arnett v. King* (sic), *supra*, it was noted that dismissal must be for "cause" which affects the efficiency of the federal service. * * *

It is clear from the GSFC management's case that, using the Milestone Reporting Manual as the measure, delays occurred in preparation by plaintiff of his preliminary procurement plans. But after nearly two years of

carping about plaintiff's "errors," in direct testimony GSFC witnesses—except in a few instances noted hereinafter—remained singularly silent regarding the specifics of the errors.

There is no mention in GSFC testimony of what were plaintiff's ". . . extraneous activities within the Center . . ."[52] Nor did GSFC witnesses in GSFC testimony identify exactly what were plaintiff's ". . . carelessness, inconsistencies, numerous obvious errors, noncompliance with procurement instructions, and repetition of past mistakes . . ."[53]

On the other hand plantiff offered testimony contesting the charges of his alleged dilatoriness on the major procurements. Testifying on the allegations of delay under PR 830-43610, plaintiff . . . noted that the plans are distributed for review principally to technical and pricing people ". . . these are people not under my control." (Tr. 198-199). He established that the plans in evidence were first drafts (199), that some of the alleged errors were not errors but amounted to "opinions", and editorializing, or merely personal preference as to language, subject matter or content (Tr. 273) Mainly, "It was a matter of coordinating people in the agency . . . try to get a consensus . . . getting consent from supervisors . . ." (Tr. 200).

Another error assigned to plaintiff in the late PR 830-46310 plan was plaintiff's intention to obtain D&F

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[52]Record—Part I, Hearing File, Page 126; "Notice of Proposal to Remove" dated December 16, 1970 (quote from page 2, paragraph 3 of Notice).

[53]Id. F.N. 52, Page 126 (quote from paragraph 4, last sentence).

* * *

negotiation authority under exception (11) of Section 2304(a) of Title 10 of the U.S. Code. The supervisor felt that authority should be under exception (10) of Section 2304(a). (Tr. 76). The matter is no somple error. It is related to the accuracy and content of the statement of work because it involves technical questions. Thereafter it must go to the Office of Counsel for a legal review. Those are procedures beyond plaintiff's control timewise, which can result in weeks of delay.

* * *

Plaintiff put in evidence Procurement Regulation 1.309 entitled "Solicitation for Informal Planning Purposes" (Tr. 203-205), which provides: "Requests for quotations may be issued for planning purposes only with the prior consent of the Procurement Officer." As plaintiff expressed it ". . . they are without funds." (Tr. 204) Under cross-examination it developed that the rule was intended to prevent procurement requests unless funds had been appropriated, except under special circumstances with special authorization. Since the reorganization, it appeared the rule was often breached (Tr. 310-313). All the procurements in Attachment B had been initiated with planning PRs (Tr. 205). In short, neither the requirements nor the money for them could be assured until fiscal year appropriations were passed by Congress.

Plaintiff was criticized in the procurement plan for PR 830-46311 for inaccurate funding data.[55] GSFC management offered no testimony to explain this matter, or its relation to delay. The financial data problems appeared

[55]Record—Part 1, Agency Exhibit No. 12, page 392; and Agency Exhibit No. 13, error No. 3, page 403.

to have been overcome when the plan was finally approved on June 11, 1970.[56] Yet, as late as October 5, 1970, Mr. Goldman was still directing plaintiff to ". . . proceed with appropriations on the pre-negotiation plan . . . leading to definitization . . . by October 31, 1970." (Tr. 300) In both PR 830-96240 and PR 810-94280 plaintiff was criticized for financial irregularities in plans submitted late.[57] In the first (96240) he "expected requirement changes."[58] In the second (94280) he projected a two-year incremental funding profile, and then stated that no appropriated funds had been approved.

* * *

Plaintiff's contentions, uncontroverted on the record, consistently implicated components of the GSFC organizations as responsible for delays charged to him in Reason No. 1, and also showed that GSFC Procurement Division, in its zeal to meet schedules, itself operated outside the pale of NASA regulations.

E. Plaintiff's Refusal To Proceed With A Pre-Negotiation Plan Was Proper Insofar As It Was Supported By Evidence Produced By Plaintiff as Against No Evidence Produced By GSFC.

* * *

PR 830-46311 has been based upon a 14 man-year requirement for services. The Chief Technical Officer insisted that it was right; and Mr. Goldman stated: "We

[56]Record—Part 1, Agency Exhibits No. 14, page 414.

[57]Record—Part 1, Agency Exhibits Nos. 17 and 2 respectively. Tr. pages 430 and 376.

[58]Record—Part 1, Agency Exhibit No. 18, page 438.

had discussions with the technical officers to corroborate whether his estimation . . . was valid, and he reiterated that it had been" (Tr. 64). The technical staff was not asked and did not present any back-up support for its estimate.

Plaintiff insisted that the requirement of the technical group was inaccurate. It should be 11 or 11-1/2 man--years (Tr. 64). The branch head felt plaintiff had not, would not or could not support his contention.

* * *

Although plaintiff appeared to be trying to save the government the cost of two and one-half man-years, procurement management accepted the Chief Technical Division Officer's evaluation without question, and required plaintiff to document his contention, or accept the 14 man-year estimate. The matter was discussed at the Assistant Chief for Procurement level. Again plaintiff was asked to give satisfactory support for his contention. After much discussion plaintiff was directed to support the 14 man-year estimate, which plaintiff declined to do. Consequently the procurement was assigned to another negotiator.

Plaintiff denied that he had not given data. He stated that it wasn't written because he had no typist. Plaintiff's data consisted of:

1. the fact that he had done a considerable amount of staff work on that particular matter;
2. he had long experience with that contract;
3. he had already a technical assessment; and
4. he had a pricing report in process. (Tr. 302)

NOTE: The following text is a continuation of the 14-man-year issue excerpted verbatim from Pettioner's Reply Brief before the United States Court of Claims, commencing on page 9.

. . . the most difficult to explain of the GSFC charges against plaintiff was his insistance upon a 11-1/2 man-years term for a procurement when the chief technical officer stated 14 . . . Indeed defendant characterized plaintiff's justification as "truly astounding," and quoted it (defendant's brief, page 23). The astounding part was that plaintiff conceded that the order to negotiate 14 man-years was right, provided the order wasn't arbitrary; and then plaintiff left the impression that the 14 man-year order *was* arbitrary, because "management . . . presented no evidence its order was not arbitrary." It is not management's duty, defendant argued, to prove its orders are not arbitrary.

Under both the Truth in Negotiation Law, P.L. 87-653 (Sept. 1962), 10 U.S.C. 2304(g), and the NASA Procurement Regulations (NPR) Part 3.800, which in 48 pages sets out the procedures for negotiation of NASA contracts, plaintiff had brought the transaction through the proposal to the negotiation stage. He was aware NPR 3.801-2 stated, amongst other things, that:

> "The Contracting Officer shall obtain simultaneous coordination of the specialists efforts to the greatest practical extent. He shall not, however, transfer his own responsibility to them."

He was also aware of the requirement of NPR 3.804-2:

> "It was imperative therefore that technical evaluations and recommendations by fully documented . . ."

Plaintiff stated . . . that he "had already a technical assessment."

The chief technical officer then injected his own opinion, and demanded that plaintiff change the contract term from 11-1/2 to 14 man-years. Plaintiff's concern was that the regulation requied full documentation in order for him, as contracting officer, to make such a judgment, that is: whether there was support for 14 man-years to supersede the data he had developed for an 11-1/2 man-year term. If so, then perhaps he would have to go back to the contractor for a new proposal on the 14 man-year term basis.

* * *

In such circumstances it was not wrong for plaintiff to request management, in effect, to prove its order was not arbitrary (i.e. furnish documentation). Under both law and regulation plaintiff, as contracting officer, had no other course of action.

CONCLUSION

The principle enunciated by the U.S. Supreme Court in *United States ex rel. Acardi v. Shaughnessy, supra,* has received wide-spread application by United States courts of appeal:

> "These regulations, consistent with the underlying statute, had the force and effect of law, and officials governed by the regulations were without legal authority to ignore or violate them to the detriment of the interested applicant. This is a settled rule that has been enforced in a wide variety of context . . . ," *United States ex rel. Checkman v. Laird,* 469 F.2d 773 (1972), 780; i.e., compare *Monroe County Conservation Council, Inc. v. Volpe* 472 F.2d 693

> (1972): "It is unlawful to construct a bridge over any navigable river without a permit, 33 U.S.C. 40." *** *** "It defies reason to think that the federal government should obligate itself to a project which has not yet complied with federal law, and Department of Transportation regulations specifically state that no federal funds are to be paid for any cost incurred not in conformity with federal law."

If Argument III of plaintiff's main brief is correct, the GSFC procurements cited in GSFC charges against plaintiff (main brief, Appendix B), in several respects involving plaintiff, were not in conformity with either federal procurement laws or NASA procurement regulations. It follows, then, that under the *United States ex rel. Accardi v. Shaughnessy, supra,* principle, it was GSFC, not plaintiff, who was primarily at fault.

APPENDIX C

[Excerpts from Part IV of Petitioner's Brief before the Court of Claims]

IV.

PLAINTIFF'S ALLEGED MISCONDUCT SHOULD BE EVALUATED IN TERMS OF ALL THE SURROUNDING CIRCUMSTANCES ON THE RECORD FLOWING FROM THE GSFC PROCUREMENTS DIVISION REORGANIZATION OF 1968, WHICH CREATED HEAVY PRESSURES TO MEET SCHEDULES AND COMPROMISED PLAINTIFF IN HIS EFFORT TO FULFILL LEGAL REQUIREMENTS. FROM THE SUM OF THE EVENTS IT BECOMES CLEAR THAT GSFC MANAGEMENT MUST BEAR ITS RESPONSIBILITY AS A CAUSE OF PLAINTIFF'S ALLEGED MISCONDUCT.

. . . plaintiff was accused of threatening to "slap" his section head. It occurred when the supervisor interrupted plaintiff at work to discuss schedules. Plaintiff denied making any threat (Tr. 286) but a witness said that although she didn't see the parties, she heard what might be a threat. But she faltered under cross-examination (Tr. 14). If indeed such a threat was ever made, it lacked any conviction that it could be carried out. In fact, it was plaintiff who walked away.

. . . plaintiff's section head charged plaintiff with misconduct, such as willful disrespect and insubordination. Whether one accepts either the section head's testimony that plaintiff's conduct on September 15th and November 4th, 1970 was insubordinate or amounted to willful disrespect (Tr. 138-143); or plaintiff's denials and justifications (Tr. 287-298); or one concedes that there was a little of both involved, the surrounding circumstances were the same.

What were the surrounding circumstances?

Although the reorganization was banned in testimony, it could not be suppressed. Under the procedures that were put into practice after the reorganization the section head would make assignments. These were novel approaches. They put the "machine type" scheduling into effect in 1968 (Tr. 259-260). The milestone system of scheduling was essential to control some 26,000 procurement actions valued at $400 million (Tr. 37). Plaintiff observed that his section head was responding to demands put upon him by the Assistant Chief of Procurement, Mr. Cappello, who ". . . had been running a schedule drill of his own" (Tr. 299). The section head explained that one of his functions was to obtain the status of procurements. The information was essential to the branch and then to the division.

But if the reorganization changed the mode of operation, in plaintiff's opinion it still was not superior to ". . . the regulations, the law . . . Act of Congress . . ." (Tr. 174). Therefore plaintiff continued to place his primary emphasis upon assuring that technical, financial, legal and contractual terms were in accordance with procurement requirements.

What did that get him? He wasn't selected as section head. ". . . Mr. Cappello evidently . . . made the change against me," plaintiff charged. Having worked with plaintiff for many tears, it is probable that Mr. Cappello knew that plaintiff would not compromise legalities to preserve schedules. With such emphasis upon scheduling it becomes evident that ability to meet them became a predominant factor in the selection of the Sec A section head.

* * *

Then followed two years in which plaintiff tried, sometimes assiduously, sometimes even successfully to resolve technical, financial and legal problems, but at the cost of meeting milestone schedules. Mr. Cappello pressed Mr. Tominovich, who pressed plaintiff to meet schedules. Plaintiff's problem solving efforts became to GSFC, without in-depth explanation, characterized as "errors" and "delays," prejudicing plaintiff's federal service status, and leading him through four intensive CSC appeals to clear his record, each of which failed.

So as he entered the third year, autumn of 1970, plaintiff was caught in an ever intensifying crossfire between the schedule pressures versus legal commitments. Where he knew an order would lead into an explosive contractual situation, he demanded that it be put in writing. When he felt that his basis for a contract negotiation was well grounded and had reason to believe that of a superior was not, he felt that he acted in the interest of the government when he persisted in maintaining his own negotiation position.

If all of these matters were clearly plaintiff's fault, a willful dilatory obstinance because he had not been appointed section head, his dismissal would have been beyond question. But plaintiff raised legal questions throughout the hearing which, when examined in context with the pertinent laws and regulations, indicate that the GSFC management, in its zeal to meet schedules imposed under the new organization, pressed plaintiff to circumscribe the requirements. When plaintiff declined to do so, then he was charged with errors, delays and inadequate performance.

Those were the surrounding circumstances, which the analysis . . . supports. Plaintiff's overt acts in autumn 1970 were more than threats, insubordination and willful

insubordination. These were signs that plaintiff was reacting to the pressure of the crossfire between schedules and his penchant for meeting legal requirements as law and regulations required. After nearly thirty years of self-containment, plaintiff was pushed past the breaking point; his temperament was strained, his judgment distorted. Under all the evidence of the whole record, considering the questionable involvement of the agency, the charges were over-emphasized and not exclusively plaintiff's fault.